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No. 92-684

In The

Supreme Court of the United States

October Term, 1992

THE PAYMASTER CORPORATION,

Petitioner,

v.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioner Paymaster submits this reply brief in further support of its petition ("Petition") for writ of certiorari, and in reply to arguments first raised in the brief in opposition ("Opp.") of respondent American Bankers Insurance Company of Florida ("ABIC"). ABIC's opposition shows that the Court should either grant the Petition or summarily reverse and remand.

II. ABIC'S OPPOSITION HAS NO MERIT

ABIC opposes certiorari on the ground that the Ninth Circuit majority opinion[1] did not create an unprecedented "no burden of proof" rule for relief from judgment under Rule 60(b)(5). The majority opinion cannot reasonably be reconciled with ABIC's characterization of it:

1. The majority opinion states that its resolution of the factual issue of the unclear meaning of the settlement agreements "should not depend on who instituted the litigation." *See* Petition, App. 7 n.2. In context, this statement can mean one thing, and one thing only: when the moving party on a Rule 60(b)(5) motion relies upon the factually disputed meaning of an unclear settlement agreement, then neither the moving party nor the respondent bears the burden of proof.

2. The majority opinion concludes its opinion by *twice* stating that it is not "persuaded" by Paymaster's interpretation of the evidence, as though Paymaster shouldered the burden of proof on ABIC's Rule 60(b)(5) motion. *See* Petition, App. 10 & n.10.

3. The majority opinion states that it rejects the approach to the burden of proof of the Sixth Circuit in *United Steelworkers of America v. North Bend Terminal Co.*,

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[1] Unlike the Ninth Circuit majority opinion, the District Court did not rely on the application of the burden of proof to decide ABIC's Rule 60(b)(5) motion. *See* Petition, App. C. It is therefore a red herring for ABIC to argue that Paymaster did not complain to the Court of Appeals about the burden of proof that the District Court applied. *See* Opp. at 3.

752 F.2d 256 (6th Cir. 1985). *See* Petition, App. 7 n.2. The majority opinion notes that the approach of the Sixth Circuit requires ruling against the party with the burden of proving the factually disputed interpretation of an unclear contract when the contract itself is silent on a relevant term. *Id.* The majority opinion further notes that the application of this burden of proof "would result in a ruling for Paymaster, since [ABIC] chose to file this [Rule 60(b)(5)] motion to determine its rights." *Id.*[2]

If allowed to stand, the published majority opinion will encourage any litigant that has a second thought about a judgment based on a settlement agreement to file a Rule 60(b)(5) based on a claimed ambiguity in the settlement. Today, ABIC's motion has deprived Paymaster of $1,700,000.00 previously awarded by a jury after a five-week trial. Tomorrow, similar Rule 60(b)(5) motions could be utilized to unsettle important institutional consent decrees.

ABIC also argues that the Ninth Circuit's determination of the burden of proof issue is irrelevant because Paymaster urged the Ninth Circuit to consider extrinsic evidence on ABIC's Rule 60(b) motion, and the Court

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[2] ABIC dismisses the Sixth Circuit's approach in *United Steelworkers* as a "doctrine of judicial abdication." *See* Opp. at 8. This assertion is no more accurate than the assertion that placing the burden of proof on a plaintiff constitutes a "doctrine of judicial abdication." Although ABIC does not say so, the Sixth Circuit explained that the source of its approach to the burden of proof was the opinion of Judge Friendly in *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F.Supp. 116, 121 (S.D.N.Y. 1960). *See United Steelworkers*, 752 F.2d at 261. Judge Friendly is not known for "judicial abdication."

considered that evidence. *See* Opp., pp. 8-9. ABIC's argument is misplaced. Nobody complains that extrinsic or intrinsic evidence was considered. The question is whether the Court applied the proper standard (burden of proof) in evaluating that evidence.

ABIC also disregards the neutral principles of statutory interpretation that this Court has attempted to develop. ABIC contends that "many courts, including this Court in *Rufo*, have repeatedly required a heightened level of proof for prospective relief from a non-monetary damage provision" under Rule 60(b)(5). *See* Opp. at 14. In fact, *Rufo*[3] does *not* say whether Rule 60(b) permits multiple "levels of proof." ABIC is wrong to submit that the burden of proof under Rule 60(b) mutates depending on the circumstances and the applicable subdivision of the rule. The Court rejected this approach to the burden of proof under 11 U.S.C. § 523 in *Grogan v. Garner*, 498 U.S. ___, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

III. CONCLUSION

The Ninth Circuit's opinion on Rule 60(b) is unprecedented, conflicts with the standard utilized in other circuits, and will breed litigation by undermining the finality of federal judgments. Accordingly, the Court should grant the petition for a writ of certiorari. Alternatively, the Court should summarily reverse the Court of

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[3] The Ninth Circuit's opinion does not cite or address the opinion of this Court in *Rufo*. Paymaster's appeal was taken under submission by the Ninth Circuit on October 10, 1991. *See* Petition, App. 2. *Rufo* was decided on January 15, 1992.

Appeals' decision and remand the case for reconsideration by the Ninth Circuit in light of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. ___, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).

Respectfully submitted,

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